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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 466

DIESEL TANKER, A. C. DODGE, INC.,

Petitioner,

against

A. B. STEWART, GUY JANSON, K. G. POLAND and G. B. BROOKES, etc.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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No.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DIESEL TANKER, A. C. DODGE, INC., prays that a writ of certiorari issue to review so much of the judgment of the United States Court of Appeals for the Second Circuit entered May 11, 1967 which affirmed the granting by the United States District Court for the Southern District of New York of a final decree dismising petitioner's libel against respondent K. G. Poland. The suit was brought to recover amounts due from one or more of the four respondents as underwriters at Lloyds and as representatives of other similar underwriters under various policies insuring petitioner against legal liabilities as specified in said policies.

Citations to Opinions Below

The opinion of the United States District Court for the Southern District of New York (R 133-143) * printed in the appendix herein (*infra*, pp. 1a-7a) is reported at 262 F. Supp. 6 (1966) and at 1966 A.M.C. 1746.

The memorandum opinion of the United States Court of Appeals for the Second Circuit (R 27a, 28a) which affirmed on the opinion of the District Court appears in the appendix hereto (*infra*, pp. 8a, 9a) and is reported at 376 F. 2d 896 (1967).

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on May 11, 1967. A timely petition to the Court of Appeals for rehearing was denied by order filed June 1, 1967 (R 38a, *infra*, pp. 12a, 13a).

The jurisdiction of this Court is invoked under 28 USC Sec. 1254 (1).

Question Presented

Under a policy insuring against legal liability for "loss, damage and/or expense to others and/or to the property of others" and "for loss of life and personal injury" may the insurer escape payment to the insured because the amount of the insured's legal liability to a third party, as established in an adversary proceeding, was satisfied by an offset awarded such third party rather than by actual payment of a money judgment against the insured in favor of such other party.

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* References preceded by the letter "R" are to the record.

Statement of the Case

Based upon a stipulation of facts (R 13a) and five exhibits consisting of four insurance policies issued respectively by the respondents and another form of policy referred to in one of respondents' policies, the District Court found and the Court of Appeals adopted the following facts:

On May 25, 1952 petitioner's vessel *A. C. Dodge* collided with the *SS Michael* with resultant loss of life to persons aboard both vessels, personal injuries aboard both craft, loss of cargo on the *Dodge*, damage to the *Michael* and total loss of the *Dodge* (*infra*, 1a). Following the collision petitioner filed a petition for limitation of liability pursuant to 46 USC 183 which, after trial and appeal, resulted in a final decree holding both the *Dodge* and the *Michael* jointly to blame and granting petitioner limitation of liability. *Cf. Petition of Diesel Tanker A. C. Dodge, Inc.*, 133 F. Supp. 510 (E.D.N.Y. 1955), aff'd. 234 F. 2d 374 (2d Cir. 1956). Petitioner was required to deposit in its limitation of liability fund $60.00 per ton of the vessel's gross tonnage for the benefit of personal injury and death claims, pursuant to 46 U.S.C. Sec. 183. From that fund petitioner paid $64,531.50 to one of the death claimants. Before the collision litigation terminated, the *Michael's* owner had paid $610,360 in settlement of death and injury claims and $37,561.75 in settlement of the claim of the owner of cargo on the *Dodge*. The *Michael's* agreed claim for physical damage to that vessel and loss of earnings was $462,618.69. The value of petitioner's vessel *A. C. Dodge* prior to the collision was fixed at $800,000 and other related items of damages brought the petitioner's claim against the *Michael*, exclusive of the amount paid from her limitation of liability fund, to $803,650.57, (Item 5 of stipulation of facts in pre-trial order (R 13a).

In the collision litigation the *Michael* owner was allowed to offset one-half of her physical damage claim plus one-

half of her payments on account of death, personal injury and cargo claims against one-half the damages allowed to petitioner against the *Michael* for loss of the *Dodge* and incidental expenses. (Opinion, *infra,* 6a.) *Cf. The Albert Dumois,* 177 U.S. 240 (1900). If no death, personal injury or cargo damage claims had resulted from the collision petitioner would have been allowed to recover from the *Michael* owner one-half the difference between the respective property damage claims and would have obtained an affirmative recovery of $170,515.94. Instead and solely because of death, personal injury and property damage claims of third parties (for one-half of which the *Dodge* was legally liable to the *Michael* thereby giving the *Michael* owner a right of offset) petitioner recouped nothing from the *Michael* on account of petitioner's property damage claim and thereby lost $170,515.94.

Petitioner had arranged with the various respondents four policies of insurance against its legal liability for death, personal injury and cargo claims. (Opinion, *infra,* 2a.) Those policies were:

A Protection and Indemnity (P&I) policy insured in the amount of $25,000., issued by respondent A. B. Stewart;

An Excess P&I policy insuring in the amount of $175,000. but excess of the first $25,000. of liability, issued by respondent Janson;

A "Legal and/or Contractual Liability" policy issued by respondent Poland insuring in the amount of $750,000.;

An Excess Legal and/or Contractual Liability policy issued by respondent Brookes insuring in the amount of $250,000. excess of $750,000.

The insuring clause of the third (the Poland) policy reads:

> "To cover the legal * * * liability of the Assured for all loss or expense resulting from the legal * * * liability of the Assured and/or their employees

> and/or agents and/or vessels owned, chartered or operated by the Assured for loss, damage and/or expense to others and/or to the property of others of whatever kind whether afloat or ashore and for loss of life and personal injury, death or illness of any person or persons arising out of or resulting from the ownership, use or operation of vessels owned * * *." (Opinion, *infra*, 6a.)

Clause 8 of the same policy excludes claims collectible by the assured under other policies including the Stewart and Janson P&I policies. (Opinion, *infra*, 6a.)

Respondent Stewart having paid the full amount of his policy (the first P&I policy) on account of litigation expense and toward reimbursement of the amount paid by petitioner out of its statutory limitation of liability fund, the suit against him was dismissed by stipulation. (Opinion, *infra*, 3a, note 3.) Since the amount of petitioner's claim does not reach the excess limits of the fourth policy issued by respondent Brookes, the suit was likewise dismissed by stipulation as to that respondent. (Opinion, *infra*, 3a.) Thus the parties before the Court at time of this trial were respondent Janson who had issued the Excess P&I policy and respondent Poland who had subscribed to the primary Legal and/or Contractual Liability policy.

The District Court held and the Court of Appeals affirmed that the P&I policy issued by Janson was, in respect of this loss, one of strict indemnity and that since petitioner had not actually paid out of its pocket the amount here claimed, the P&I policy did not cover the loss and dismissed the suit against him. Petitioner does not seek review of that part of the decision.

The Court also dismissed the libel against Poland who subscribed to the Legal and/or Contractual Liability policy. Although the Court recognized that petitioner had suf-

fered a loss because the *Michael* had been allowed to offset against petitioner's recovery the amount the *Michael* had paid in settlement of death and personal injury claims, it held that petitioner "did not incur the requisite legal liability as a result thereof". The Court also stated that the Poland policy covers only "the assured's liability for loss *to others* or the property of others." (Opinion, *infra*, 7a.) The District Court evidently did not consider that the *Michael* owner fell within the category of "others" and did not consider that the *Michael* owner's payment to third parties was a "loss" to the *Michael* owner of the type referred to by the words "liability for loss to others."

Reasons for Granting the Writ

The question of law involved is of great importance to business of all types and indeed, to a tremendous number of private individuals in the United States. It is not necessary to dwell upon the prevalence of legal liability insurance in this country among home owners, automobile owners, small pleasure boat owners and sportsmen of all types as well as almost every commercial enterprise. While the involved policy covers marine liabilities, its language, in all important respects, is similar to that which will be found in innumerable liability policies not related to the shipping world.

The decision sought to be reviewed is in direct conflict with the decision of the United States Court of Appeals for the 5th Circuit in *Simon* v. *Maryland Casualty Company*, 353 F. 2d 608 (1965). In that case plaintiff Simon was a subcontractor under a Government contract and had caused fire damage to a Government building. Maryland had issued Simon a policy insuring against legal liability for negligent damage to property. The Government withheld from Simon's prime contractor a sum representing damages to

Government property caused by Simon's negligence and the prime contractor in turn withheld from Simon an amount of money otherwise admittedly due Simon for work under the subcontract. In the suit by the contractor against the Government for recovery of the amount withheld by the latter, in which Simon participated, the Court found that the fire damage was due to Simon's negligence and upheld the right of the Government to withhold from the prime contractor and of the latter to withhold from Simon, payments otherwise due under the contract and subcontract. The defendant insurer refused to pay to Simon, under its liability policy, the amount withheld by the prime contractor on the ground that the insured had not been held legally liable to pay damages. In the course of its opinion holding Maryland Casualty Company obligated to pay Simon, the Court of Appeals for the 5th Circuit stated in a unanimous decision (at p. 611)

> "Several things stand out sharply. First, the Assured-subcontractor has suffered the irretrievable, permanent loss of $7,886.83 plus its share of legal costs. Second, this loss was the direct result of operational negligence of its employees. And third, and perhaps more decisive, a full-fledged court having jurisdiction over the subject matter and the parties in a genuine no-holds-barred-adversary proceeding necessarily determined that the conduct of the Assured-subcontractor was negligent. In a word, the Insurer got every protection it would have obtained had the suit been United States v. Simon or Douglass Bros., Inc. v. Simon. The question is, therefore, whether by any reasonable construction of the policy, it ought to bear the same liabilities."

And at page 612:

> "A suit is against an assured when, in a judicial proceeding to which he is a party (or deemed by the law to be a party), a definable claim or con-

> tention is asserted that the assured has a legal liability for damage or injury to person or property. Similarly, it is a judgment against an assured where, in such a situation, the tribunal renders an enforceable decree adjudging that the assured has a legal obligation to pay, reimburse or bear, the loss sustained by the third party. Thus, for example, a claim by way of offset, not an affirmative counterclaim, F. R. Civ. P. 13, or *striking the balance in a maritime half-damage situation,* see e.g. Gilmore & Black, Admiralty §§ 3-39, 7-4, 7-6 (1957); The Ella Warley-North Star, 1882, 106 U.S. 17, 22-23, 1 S. Ct. 41, 46, 27 L. Ed. 91, 93-94, *obviously would be covered.*" (Italics supplied.)

Since the *Simon* decision so closely parallels this case, we deem another quotation from it appropriate (p. 614):

> "The upshot of it is that for a case and a claim admittedly within the coverage of the policy, meeting both the needs of the Assured and full protection of the Insurer, the Insurer bears no liability because the form of litigation was unorthodox. The language of neither the Defense Coverage Clause nor the No-Action Clause was ever intended to bring about such an artificial windfall."

In the instant case petitioner, after trial and appeal, was held legally liable for a collision which resulted in claims for loss of life, personal injury and cargo damage. Because of the intricacies of Admiralty law the petitioner did not pay money directly to the majority of the third parties who were making claim for such deaths, personal injuries and cargo damage claims. If it had done so, unquestionably it could have recouped from its various insurers. Nevertheless, although petitioner did not make payments out of its pocket, it did suffer a loss. That loss was suffered because the *Michael* could and did use the

amounts she had paid on those third party claims to cancel her obligation to petitioner. Therefore, the offset granted the *Michael* under Admiralty law amounted to a payment by petitioner to the *Michael* owner of sums of money on account of liabilities of petitioner for deaths and injuries to others.

There is no material difference, we submit, between the state of facts in this case and the state of facts involved in the 5th Circuit case of *Simon* v. *Maryland Casualty Company* (*supra*).

The insuring clause involved in *Simon* v. *Maryland Casualty Company* (*supra*) reads: (Cf. footnote 8 of decision)

> "I Coverage B—Property Damage Liability
>
> To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of injury to or destruction of property, including the loss of use thereof, caused by accident."

The insuring clause of the Poland policy issued to this petitioner reads:

> "To cover the legal and/or contractual liability of the Assured for *all loss* or expense resulting from the legal and/or contractual liability of the Assured and/or their employees and/or agents and/or vessels owned, chartered or operated by the Assured *for loss, damage and/or expense to others* and/or *to the property of others* of whatever kind whether afloat or ashore *and for loss of life and personal injury, death or illness of any person or persons* arising out of or resulting from the ownership, use or operation of vessels owned, or as a result of acting as Agents, chartered or operated by the Assured or arising out of or resulting from the piloting or other

handling of Vessels (with or without their own power) of others by the Assured or others for whom they may be responsible or arising out of or resulting from the acts or omissions of pilots or others for whose acts or omissions the Assured may become liable." (Italics supplied.)

The facts and the language of the insuring clauses in this case and in *Simon* v. *Maryland Casualty Company* (*supra*) are so closely alike that conflict between the two decisions is readily apparent. We submit that the decision here sought to be reviewed is erroneous in law and that the reasoning in *Simon* (*supra*) is in keeping with the modern trend.

Respondent may argue as it did below that petitioner is not seeking to recover a loss it sustained because it had been held legally liable to the *Michael* for one-half the third party death and injury claims but is seeking to recover a loss it sustained by reason of the destruction of its own property in the collision with the *Michael*. That reasoning, we submit, is erroneous. While it is true that the money petitioner sought to collect from the *Michael* represented partial payment for the loss of petitioner's property, it is equally true that the money plaintiff in *Simon* (*supra*) would have received was payment for work, labor and services. In each case the payment was denied because of an existing legal liability to the party who otherwise would have been obligated to make such payment. The question to be asked and answered is not what the denied payment represented but rather what was the ground on which or the reason why the payment was denied. In this case and in *Simon* (*supra*) the payments were denied because of a legal liability for damage to property and/or injury to persons against which liability the parties had paid premiums to insure.

In the Courts below the respondents argued that petitioner could have avoided this loss if it had arranged hull

insurance on its vessel for the full amount of her market value thus transferring this loss to hull underwriters but the fact is that petitioner, as it was free to do, insured the hull for an amount agreeable and aceptable to its hull underwriters which was substantially less than her market value. These legal liability underwriters have no concern with the hull insurance arrangements which petitioner and the hull underwriters saw fit to make. Because of the limited hull insurance which petitioner arranged, the loss here suffered by petitioner is entirely for its account and not for the account of any other insurer. Petitioner suffered that loss because of its liability for death, personal injury and cargo claims against which liability it paid these respondents to insure. The concerned respondents should not receive a windfall merely because the *Michael* saw fit to settle the third party claims in the first instance and offset them against the petitioner. If the *Michael* had not settled those claims and permitted the various third parties to continue in the litigation petitioner would have effected a recovery from the *Michael* for the loss of its vessel which recovery would have become part of petitioner's limitation of liability fund and would have been paid pro rata to those third party claimants. We submit the route by which the liability fell upon petitioner is unimportant. Important only is the fact that petitioner suffered a loss by reason of its legal liability for these claims and against which liability these respondents accepted premiums to insure.

We submit that the conflict in the decisions of the Second and Fifth Circuits concerning the rights of an assured under "legal liability" insurance in the circumstance described should be resolved and that this decision should be reviewed.

Conclusion

It is respectfully submitted that the foregoing considerations warrant allowance of the writ sought by petitioner.

Dated: New York, New York
August 7, 1967

Respectfully submitted,

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of Counsel.

APPENDIX

Opinion (133-143)

UNITED STATES DISTRICT COURT

Southern District of New York

[Same Title]

Cannella, *J.*:

The libel seeking recovery under the insurance policies involved in this case, is dismissed.

Since the action is founded on marine insurance, the court finds that it is within the admiralty jurisdiction of this court. 28 U.S.C. § 1333.

This case was tried before this court, without a jury in January, 1966. Suit was brought against the respondents as underwriters and as representatives of other subscribers to policies of insurance issued by Lloyds, London, insuring the libellants[1] against loss by reason of liabilities arising from certain cases enumerated in the policies.

On May 25, 1952 the Diesel Tanker A. C. Dodge collided with the S.S. Michael (and thereafter fire occurred) with resultant loss of life to persons aboard both vessels, personal injuries aboard both craft, loss of cargo on the Dodge, damage to the Michael and total loss to the Dodge.

Following the collision libellant Dodge filed a petition for limitation of liability and after trial and appeal it was held that the collision resulted from the joint fault of the Dodge and the Michael. It was also held that libellant Dodge was entitled to a limitation of liability. Petition of Diesel Tanker A. C. Dodge, Inc., 133 F. Supp. 510 (E.D. N.Y. 1955), aff'd, 234 F.2d 374 (2d Cir. 1956). The Dodge was required to deposit in its limitation of liability fund $60.00 per ton of the vessel's gross tonnage for the benefit

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[1] Alma R. Bushey and Raymond J. Bushey, Jr., as Executors of the Estate of Raymond J. Bushey, deceased, disclaimed any interest in any amount recovered by libellant Dodge from any of the respondents and consented to the payment thereof to said libellant.

of personal injury and death claims, pursuant to 46 U.S.C. § 183. Out of this fund the libellant paid $64,531.50 to Frances Elliott, Administratrix of the Estate of John Elliott, Master of the Dodge, who died in the collision.

Before the above-mentioned litigation terminated, the owner of the Michael had settled the majority of the personal injury and death claims and the claim of the owner of the cargo on the Dodge. The Michael owner also paid to Frances Elliott the sum of $59,000.00 for a covenant not to sue the Michael.

The Dodge owner was insured under the policies of Hull and Disbursements Insurance in the amount of $400,000.00 which policies contained an American Hull Syndicate standard form of Running Down clause. Those insurers paid libellant the full face amount of the policy on the loss of the Dodge. The Dodge was also insured against fire in the amount of $150,000.00, in excess of the Hull Insurance coverage. The underwriters of that policy paid libellant $75,000.00 on account of the total loss of the Dodge.

There were four additional policies of insurance[2] in full

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[2] (a) Policy No. 614 B 440943, issued by respondent, A. B. Stewart and others, referred to as a Protection and Indemnity Policy (otherwise known as P & I) insuring in the amount of $25,000.00 subject to a deductibility average of $500.00.

(b) Policy No. 614 B 440944, issued by respondent Guy Janson, and others, referred to as excess Protection and Indemnity, in the amount of $175,000.00, excess of the first $25,000.00 of ultimate net loss.

(c) Policy No. 614 B 446491, issued by respondent, K. G. Poland, and others referred to as a legal and/or contractual liability policy, insuring libellant in the amount of $750,000.00.

(d) Policy No. 446492, issued by respondent, G. B. Brookes, and others, referred to as an excess legal and/or contractual liability policy, insuring libellant in the amount of $250,000.00, but only to pay the excess of $750,000.00 for losses covered by policy "(c)" hereinabove.

force and effect at the time of the collision.[3] The respondents freely admit the existence of such policies.

All the policies are in writing. The breach claimed by the libellant is the failure of the respondents to pay the amount of the loss which libellant claims was sustained. The respondents assert that the loss which the libellants claim to have sustained is not payable under the terms and conditions of any of the policies which are involved in this case.

The clauses of the policies upon which the libellant relies are alleged in the libel and the respondents do not contest the correctness of such clauses.

It is well settled that in a "both to blame" collision, if one of the colliding vessels pay third-party claims, such claims become part of the collision damage of the vessel paying the claim. See The Albert Dumois, 177 U. S. 240 (1900), N. Y. & Cuba S/S Co. v. American S.S. Owners Mutual Protection and Indemnity Assn. Inc., 72 F.2d 694 (2d Cir.), cert. denied 293 U. S. 622 (1934). Under the maritime law of collision, the Michael was able to offset one-half of her payments on account of these claims against one-half of the damages allowed to the Dodge for loss of the Dodge and incidental expenses.

It is the libellant's contention that were it not for such third party death, personal injury and cargo damage claims, the libellant would have recovered from the Michael $170,515.94. This figure is arrived at by using a general rule in a "both to blame" collision, viz., the vessel that is damaged least pays the other vessel an amount equal to one-

[3] By stipulation at the trial the libel was dismissed as against respondent underwriters subscribing the Stewart Primary P & I Policy 614 No. 440943 and against underwriters subscribing the Brookes Excess Legal and/or Contractual Liability Policy No. 446492 without costs; since the Stewart policy was paid in full and since the amount of the alleged loss did not exceed the Poland policy.

half the difference of the sum of the losses sustained. See The North Star, 106 U. S. 17, 20 (1882); Petition of the Diesel Tanker A. C. Dodge, Inc., supra. The sum of $170,515.94 is one-half the difference between the hull claim of the Michael, $462,618.69, and the total loss value of the Dodge, $800,000.00, plus stand-by wreck and salvage expenses, a total of $803,650.57.

It is libellant's contention that the alleged loss that he suffered is covered under the insurance policies involved herein. Insofar as the Protection and Indemnity (P & I) policies are concerned, the libellant asserts that the loss falls within clauses 4 and 4(a) of the Stewart policy, which is incorporated by reference into the Janson excess policy.

The P & I policies, as stated in the general provisions of such policies, undertake to insure the assured only for what he has become liable to pay and has actually paid, i.e., strict indemnity. However, clause 4(a) provides that if a claim arises under clause 4, it should be settled on the principle of cross-liabilities. The cross-liabilities principle states, in effect, that adjustment for losses in a "both to blame" collision should be made as if the owners of each vessel had been compelled to pay the owner of the other vessel some portion of the latter's damages that may properly be allowed in ascertaining the sum payable to the assured because of the collision. In other words, if cross-liabilities is applied, an insured owner will be deemed to have paid a portion of the damages even though, in fact, he has not actually expended any of his own money.

It is the libellant's position that even though he has been fully reimbursed for out-of-pocket costs or expenses, since he is demanding recovery for a loss under clause 4, strict liability does not apply; but rather, by applying cross-liabilities he could recover for the alleged loss.

It is well settled that if there is any ambiguity in a policy it should be resolved in favor of the assured. Trinidad Corp. v. American S/S Owners Mutual Protec-

tion & Indemnity Ass'n, 229 F.2d 57 (2d Cir. 1956). However, this court finds no ambiguity at all in clauses 4 and 4(a). Although 4(a) provides for the use of cross-liabilities, it is clear that it can be used to the same extent only as provided in the American Marine Insurance Syndicate Running Down Clause. This is explicitly set forth in clause 4(a).

Therefore, the use of the cross-liabilities principle would be governed by whatever limitations and conditions are established in the running down clause. The running down clause provides for the settling of claims, in a "both to blame" collision, on the principle of cross-liabilities *unless* the liability of the owners or charterers of one or both of the vessels is limited by law. Since the liability of the owner of the Dodge has been limited, it follows that the cross-liabilities *theory* principle mentioned in clause 4(a) of the P & I policy could not be used even if the libellant had incurred a liability for loss under clause 4.[4] Therefore, the libellant could only recover under the P & I policies on the principle of strict indemnity and since libellant has already been reimbursed for what it has actually paid out, it is entitled to no further recovery under the P & I policies.

In N. Y. & Cuba S/S Co. v. American S.S. Owners Mutual Protection and Indemnity Assn. Inc., supra, the court was faced with facts substantially similar to those present in this case. A shipowner made a claim against his P & I insurer for a third party loss offset by the other shipowners in a "both to blame" collision. The P & I

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[4] Even apart from the contract involved in this case, it seems to be the general opinion of text writers that in a case where the liability of one or both owners has been limited by law, the cross-liabilities principle cannot be used as a basis of settlement in a "both to blame" collision, since it would not be practical. See Hurd, The Law and Practice of Marine Insurance 123 (2d ed. 1952); Templeman on Marine Insurance 309 (1950).

policy contained a clause worded similar to clause 4 of the Stewart policy. The court denied recovery under the P & I policy. The N. Y. & Cuba S/S Co. case is distinguishable from the instant case. The policy in that case made no provision for the application of cross-liabilities and therefore, of course, contained no limitation on the extent to which cross-liabilities could be used to settle claims. Although the court recognizes the importance of the N. Y. & Cuba S/S Co. case, it is not dispositive of issue in this case, insofar as the P & I policies are concerned.

If no recovery can be made under the P & I policies, it is libellant's position that full recovery could be made under the Poland policy. This policy does not provide for strict indemnity and therefore no question would arise as to whether the policy required the application of the cross-liabilities principle. All that the Poland policy requires, as set forth in clause 3 of that policy, is that the assured incur a legal liability. Clause 3 provides that it is: "To cover the legal . . . liability of the Assured for all loss or expense resulting from the legal . . . liability of the Assured and/or their empoyees and/or agents and/or vessels owned, chartered or operated by the Assured for loss, damage and/or expense to others and/or to the property of others of whatever kind whether afloat or ashore and for loss of life and personal injury, death or illness of any person or persons arising out of or resulting from the ownership, use or operation of vessels owned, . . ."

Clause 8 of the same policy provides that recovery can be made under it only if such losses are not collectible under Hull and Machinery or P & I policies. Since the libellant's alleged losses could be collected neither under the Hull policy, from which the libellant has received the full face amount, nor under the P & I policies for the reasons mentioned above, the libellant can recover, if at all, only under the Poland policy which is referred to by the libellant as the "umbrella" policy.

While it may be true that the libellant suffered a loss as a result of the setoff against it by the Michael, this court finds that the libellant did not incur the requisite legal liability as a result thereof. As stated in the N. Y. & Cuba S.S. Co. case,[5] supra, at 697: "This diminuition [loss] was not due, however, to any liability of the Mexico to its own cargo or to the Hamilton, but simply because the Hamilton might offset its own damage in the division and such damage included its liability to the Mexico's cargo." Similarly in this case, the diminuition of the Dodge's claim was not due to any legal liability for personal injury, death and cargo damage. The libellant has already been reimbursed for any legal liabilities incurred as a result of the collision.

In any event, the Poland policy only covers the assured's liability for loss *to others* or the property of others. It does not cover any loss sustained by the assured by reason of the loss of its own property. The claim for $170,515.94 was, in effect, asserted to recover at least a part of the value (over and above that already received from various policies) of the Dodge which was a total loss.

It is this court's finding that the libellant is not entitled to recover either under the Janson or Poland policies or a combination of both. Therefore, the libel is dismissed.

So ordered.

Dated: New York, N. Y.,
March 23, 1966.

/s/ JOHN M. CANNELLA,
U. S. D. J.

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[5] Although this case was distinguished, when dealing with the P & I policies, it is of particular relevance to the present discussion.

Memorandum Opinion of the Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 450—September Term, 1966

(Argued May 4, 1967 Decided May 11, 1967.)

Docket No. 31169

DIESEL TANKER, A. C. DODGE INC., and ALMA R. BUSHEY and RAYMOND J. BUSHEY, JR., Executors of the Estate of RAYMOND J. BUSHEY, Deceased,

Appellants,

v.

A. B. STEWART, GUY JANSON, K. G. POLAND and G. B. BROOKES, etc.,

Appellees.

Before:

WATERMAN, FRIENDLY and FEINBERG,

Circuit Judges.

Libelants-appellants, who sought recoveries upon certain marine insurance policies, appeal from final decree below, United States District Court for the Southern District of New York, Cannella, *J.*, dismising their libel against all respondents-appellees. Affirmed.

Memorandum Opinion of the Court of Appeals for the Second Circuit

CHRISTOPHER E. HECKMAN, FOLEY & MARTIN, JOHN H. HANRAHAN, New York City, for Appellants.

WILBUR H. HECHT, MENDES & MOUNT, BRENDAN J. CONNOLLY, New York City, for Appellees.

PER CURIAM:

The final decree entered below dismissing the action is affirmed on the opinion of Judge Cannella, reported at 262 F. Supp. 6 (1966).

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eleventh day of May, one thousand nine hundred and sixty-seven.

Present:

Hon. STERRY R. WATERMAN,
Hon. HENRY J. FRIENDLY,
Hon. WILFRED FEINBERG,
Circuit Judges.

DIESEL TANKER A. C. DODGE, INC. and ALMA R. BUSHEY and RAYMOND J. BUSHEY, JR., Executors of the Estate of RAYMOND J. BUSHEY, Deceased,

Libelants-Appellants,

v.

A. B. STEWARD, GUY JANSON, K. G. POLAND and G. B. BOOKER, each individually and as representative of various underwriting groups at Lloyd's London,

Respondents-Appellees.

Appeal from the United States District Court for the Southern District of New York.

Judgment of Court of Appeals

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed with costs to the appellees.

A. Daniel Fusaro,
Clerk.

Judgment Denying Rehearing

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the first day of June, one thousand nine hundred and sixty-seven.

Present:

Hon. STERRY R. WATERMAN,
Hon. HENRY J. FRIENDLY,
Hon. WILFRED FEINBERG,
Circuit Judges.

DIESEL TANKER A. C. DODGE, INC. and ALMA R. BUSHEY and RAYMOND J. BUSHEY, JR., Executors of the Estate of RAYMOND J. BUSHEY, Deceased,

Libelants-Appellants,

v.

A. B. STEWARD, GUY JANSON, K. G. POLAND and G. B. BOOKER, each individually and as representative of various underwriting groups at Lloyd's London,

Respondents-Appellees.

A petition for a rehearing having been filed herein by counsel for the appellants,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO,
Clerk.

Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DIESEL TANKER, A. C. DODGE INC. and ALMA R. BUSHEY and RAYMOND J. BUSHEY, JR., Executors of the Estate of RAYMOND J. BUSHEY, Deceased,

Appellants,

v.

A. B. STEWART, GUY JANSON, K. G. POLAND and G. B. BROOKES, etc.,

Appellees.

Petition for Rehearing

FOLEY & MARTIN, New York, N. Y., for appellants.

Petition denied.

S. R. W.
H. J. F.
W. F.
U. S. C. JJ.

1 June 1967

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IN THE

Supreme Court of the United States

October Term, 1967

No. 466

DIESEL TANKER, A. C. DODGE, INC.,

Petitioner,

against

A. B. STEWART, GUY JANSON, K. G. POLAND and G. B. BROOKES, etc.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

Citations to Opinions Below

The opinion of the United States District Court for the Southern District of New York (R. 4a-10a)* is reported at 262 F. Supp. 6 (1966).

The Memorandum Opinion of the United States Court of Appeals for the Second Circuit (R27a, 28a), which affirmed PER CURIAM on the opinion of the District Court is reported at 376 F.2d 850 (1967).

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* References preceded by the letter "R" are to the record.

Question Presented

Although petitioner litigated this suit through trial and appeal against Underwriters subscribing to two policies of insurance, petitioner does not seek review of that part of the decision dismissing the libel as against the first excess Protection and Indemnity Underwriters. Petitioner seeks review only with respect to that part of the decision which dismissed the libel as against "Legal and/or Contractual Liability" Underwriters. The P. & I. Underwriters have indemnified petitioner for all liabilities incurred by petitioner in litigation arising out of the collision which forms the background of the instant litigation. The question here presented is whether the policy of Legal and/or Contractual Liability Insurance issued by respondent Poland and others covering certain liabilities of petitioner covers a loss sustained by petitioner, not with respect to any liability to others but with respect to the loss of its own property, said loss having been sustained solely by reason of the fact the petitioner did not carry full Hull insurance on its property, i.e., its vessel, but had elected to be a co-insurer with respect to its own property.

Another question presented is whether the Court should concern itself to review a decision of the United States Court of Appeals for the Second Circuit affirming PER CURIAM (rehearing denied) a decree of the District Court in a suit in admiralty involving an issue of coverage on a specialized marine insurance policy, which decision is not in conflict with the decision of any other court involving the same issue and which decision in no way affects the general insuring public.

Statement

The collision which forms the background of this litigation was between the Tanker *A. C. Dodge,* owned by petitioner Diesel Tanker A. C. Dodge, Inc., and the *Michael* occurring on May 25, 1952 as a result of which the *Dodge* was a total loss. Litigation arising out of that collision resulted in a decision that both vessels were at fault, but petitioner, as owner of the *Dodge,* was allowed to limit liability pursuant to 46 U.S.C. 183, et seq. Petition of Diesel Tanker A. C. Dodge, Inc., 133 F. Supp. 510 (E.D.N.Y. 1955), aff'd 234 F. 2d 374 (2d Cir. 1956) cert. denied 352 U.S. 928 (1956).

Thereafter, further proceedings were had on issues as to the amount of the claim of Frances Elliott, Administratrix of the Estate of John Elliott, Master of the *Dodge,* against the *Dodge* and as to the amount of the limitation of liability fund with respect to this death claim. A Commissioner's Report, assessing the value of the Elliott claim, finding that petitioner was liable for such assessed value, less the amount the Estate had received from the *Michael* under a covenant not to sue and finding that the $60.00 per ton aspect of the Limitation Statute was applicable, which resulted in an award against petitioner of $61,500.00, plus interest, was confirmed by the United States District Court for the Eastern District of New York (1959), reported at 173 F. Supp. 906, and affirmed on appeal 282 F. 2d 86 (2d Cir. 1960).

As pointed out by the Second Circuit in the second appeal in the collision litigation, 282 F. 2d 86, at page 88, in a collision where both vessels are at fault, the losses of each vessel are to be added and a decree entered in favor of the vessel suffering the greater loss in an amount equal to one-half the difference in the sums of the losses sustained, unless either vessel is entitled to limitation of liability. As the damages of the *Michael* owner were

greater than the damages of the *Dodge*, the balance was in favor of the *Michael*, but the *Michael* received nothing. The petitioner paid nothing to the *Michael*, because petitioner, by virtue of its right to limitation of liability, was insulated from having to pay the *Michael* one-half of the difference between its loss and the *Michael's* loss. The *Dodge* being a total loss as a result of the collision, there was no limitation fund available with respect to property damage claims against the vessel or petitioner.

The only third party claim which petitioner was called upon to pay as a result of the collision was $64,531.50, inclusive of interest, to the Elliott Estate. (In fact this was the only claim arising out of the collision other than the *Michael* claim that was litigated through trial against petitioner.) In addition, petitioner incurred expenses of a P. & I. nature, including litigation expenses, of $69,929.71, for a total of $134,461.21. It is conceded that the only monies actually expended by petitioner amount to $134,461.21 and that the petitioner has been reimbursed by the Excess Protection and Indemnity Underwriters-respondents and the Primary Protection and Indemnity Underwriters for this amount over the $500.00 deductible average stipulated in the Primary P. & I. Policy. The Primary P. and I. Underwriters paid their policy limits of $25,000.00. The Excess P. and I. Underwriters paid $108,961.21. (See Pretrial Memorandum, R 21a.)

Although the sound value of the *Dodge* was $800,000.00, petitioner elected to obtain and pay for only $400,000.00 of Hull insurance on the vessel, thereby becoming a co-insurer with the Hull Underwriters with respect to the vessel itself. In addition, petitioner had Fire insurance on the vessel in excess of the Hull insurance, on which it collected $75,000.00, as well as the $400,000.00 Hull insurance. The $170,515.94 for which petitioner sued respondents is the balance that the *Dodge* interests, i.e., petitioner and its Property insurers would have recovered from the *Michael* on the Hull claim

had no death, injury or cargo payments been involved. The *Dodge* Hull claim as fixed in the collision litigation was $803,650.57. The *Michael* Hull claim was $462,618.69. If that latter figure had been the full amount of the *Michael's* provable damages, the *Dodge* interests would have collected one-half the difference between the two Hull claims, or $170,515.94, but even if that had been the situation the amount collected from the *Michael* would not have been all for petitioner's account as any such hypothetical recovery from the *Michael* would have been divided equally between petitioner and the Hull insurers. This result would follow from the holding of the Court in *Aetna Insurance* v. *United Fruit*, 304 U.S. 430 (1938).

Reasons for Denying the Writ

There is no federal question involved here; there is no issue of constitutional or statutory construction involved. This case involves no more than a simple dispute between a large shipowning and operating interest and certain liability insurers on a contract of specialized marine insurance where petitioner has had his day in court and is disappointed with the result. There is nothing in the decision below which in any way affects the general public or which in any way affects the legal liability insurance policies carried by homeowners, automobile owners, or other members of the general public, or by commercial enterprises, which types of insurance are subject to state regulation. The petition should also be denied because the decision below is correct; the decision properly reflects well-established principles of admiralty law. There is no conflict between the decision in this suit brought under the admiralty jurisdiction of the Federal Court and the decision of the United States Court of Appeals for the Fifth Circuit in *Simon* v. *Maryland Casualty Company*, 353 F. 2d 608 (1965), a suit at law where the Federal Court jurisdiction was based on diversity.

POINT I

The decision below correctly reflects well-established principles of Admiralty Law.

In presenting its question to the Court of the legal issue on which review is requested, petitioner states that the liability sought to be recovered from respondents is "... the amount of the insured's legal liability to a third party as established in an adversary proceeding. . . ." (Petition p. 2).

The hard fact of the matter is that the total amount of the assured's legal liability to all third parties resulting from the collision as established by all adversary proceedings, was limited to the statutory fund of $60.00 per ton, plus interest or $64,531.50. Petitioner's entire out-of-pocket loss incurred as a result of this collision amounted to $134,461.21 including the statutory fund plus interest above, and legal fees and incidental expenses of $69,929.71. Petitioner has been reimbursed by respondents for its entire out-of-pocket loss excess of the $500.00 deductible average clause. (See Pretrial Memorandum R. p. 21a). By virtue of its right to limitation of liability, the petitioner was insulated from having to pay the *Michael* one-half of the difference between its loss and the *Michael's* loss, although the *Michael* was the creditor vessel after the balance of damage had been struck. *Petition of Diesel Tanker A. C. Dodge, supra.*

The substance of petitioner's argument is that as a result of this collision, petitioner incurred a legal liability to the owner of the *Michael* for one-half of the third party death, personal injury and cargo claims settled by the *Michael* (Petition p. 4).

This is not so. By virtue of limitation of liability, petitioner was insulated from any and all liability resulting from this collision except as to the statutory fund.

It is the established admiralty law of the United States that in a both to blame collision, only a single liability results, i.e., the liability of the owner of the lesser damaged vessel to pay to the owner of the greater damaged vessel, one-half the difference between the two damages. The *North Star,* 106 U.S. 17 (1882). In calculating damages, each vessel is entitled to include all third party death, personal injury and property damage claims resulting from the collision and paid by that vessel in the over-all total of its damages. After calculation of damages, the balance is struck by the owner of the lesser damaged vessel paying one-half the difference between the total damages to the owner of the greater damaged vessel, so that the net result is the equalization of damages resulting from a collision in which both vessels were mutually at fault. *Halcyon* v. *Haenn,* 342 U.S. 282 (1952).

Since only a single liability results in a both to blame collision situation, limitation of liability, if either owner be so entitled, cannot be applied until after the balance is struck. If entitled to benefit of limitation, the owner of the lesser damaged vessel is thereby insulated from all liability except as to the appropriate limitation fund. *North Star, supra.*

This is the established law of the United States and was correctly applied by the Courts in the previous litigation arising out of this collision, i.e., the *Dodge* and the *Michael* were mutually at fault, the *Dodge* was the debtor vessel after the balance was struck, and the *Dodge* by virtue of limitation was insulated from all liability to the *Michael. Petition of Diesel Tanker A. C. Dodge, supra.*

We submit that the Court below correctly applied the established admiralty law of the United States and the established law of the *Dodge/Michael* collision to the facts of this case, i.e., the *Dodge* having been insulated from liability to the *Michael* by virtue of limitation, the peti-

tioner-assured did not incur the requisite legal liability for any claim under the legal liability policies beyond the statutory fund and legal fees already reimbursed to petitioner by respondents. Respondents insured only certain legal liabilities of petitioner to third parties; petitioner was reimbursed by its legal liability Underwriters for such legal liability it incurred.

The Courts below correctly held that petitioner did not incur any legal liability with respect to the setoff against it by the *Michael. New York and Cuba Mail S.S. Company* v. *American S.S. Owners' Mut. Protection and Indemnity Ass'n Inc.*, 72 F. 2d 694 (2d Cir. 1934). The only loss sustained by petitioner here was one it sustained by electing to be a co-insurer with respect to its own property, the diesel tanker *A. C. Dodge.*

POINT II

The decision of the Court below is not in conflict with the decision of the Fifth Circuit in *Simon* vs. *Maryland Casualty Co.*, 353 F. 2d 608 (1965).

Petitioner bases its present claim for review by the Court upon an alleged conflict between the decision of the Court below and the decision of the Fifth Circuit in *Simon* v. *Maryland Casualty Co.*, 353 F. 2d 608 (1965). We submit that the cases are so clearly distinguishable that there is not the slightest conflict.

In *Simon* the plaintiff-assured was a sub-contractor of a prime contractor of the Government. The Government withheld a portion of the contract payment from the prime contractor because of alleged negligence in performance of the contract, some of which was claimed to be chargeable to Simon, the sub-contractor. Simon joined with the prime contractor in a suit against the Government in the Court of Claims to recover the contract price. This

litigation resulted in the finding that employees of Simon had performed negligently and that the Government was entitled to withhold a portion of the contract payment as damages. Maryland Casualty Co., Simon's liability insurer, refused to honor Simon's claim for the withheld payment and the legal fees and costs incurred in the Court of Claims. Maryland Casualty defended on the ground that its only duty was to defend suit *against* Simon and to pay any legal liability of Simon stemming from such suit. It contended that the litigation in the Court of Claims was not a suit against the assured, nor was the decree of the Court of Claims a judgment against the assured within the scope of the "defense" and "no action" clauses of the liability policy. In *Simon's* suit for declaratory judgment against Maryland Casualty, the District Court held there was no coverage, but the Fifth Circuit reversed this decision.

Judge Brown succinctly delineated the sole issue of the *Simon* case in the opening paragraph of the Fifth Circuit's opinion at page 610:

> "The question in this case is whether the defense coverage provisions and no action clause of a general liability policy are to be read so literally that an assured, who, in an adversary proceeding has been adjudicated guilty of negligence by a constitutional court, is denied any coverage because the suit was by, not against, him and no affirmative monetary judgment was rendered against him. The District Court in this declaratory judgment action held no coverage. We disagree and reverse."

It is obvious that the Fifth Circuit considered the sole question in the case to be whether Simon had been adjudicated legally liable in an adversary proceeding and, having answered this question in the affirmative, it concluded there was coverage under the policy.

Here there was no legal liability on the part of petitioner for property damages because it was entitled under

the limitation of liability statute to limit its liability to nothing with respect to property damage claims. Under the findings in the collision litigation its liability for personal injury and death claims could not have exceeded the statutory $60.00 per ton fund and petitioner has been reimbursed to the extent of its liability for such claims.

Another clear distinction between the two cases is that it is obvious in the *Simon* case, that the Government, had it not withheld the amounts due under the contract, could have sued Simon direct as a tort-feasor and would have recovered a judgment based on Simon's legal liability. Here, had the death and injury claimants all proceeded against the petitioner in the collision litigation which, with the exception of the Estate of Elliott, they did not, the sum total of the recoveries on all such death and injury claims could not have exceeded the statutory limitation fund.

There is another clear distinction between the two cases. The instant case involves a suit in Admiralty founded on contracts of marine insurance and brought under the Admiralty jurisdiction of the Federal Court, 28 U.S.C. 1333 (District Court opinion R 4a). *Simon* v. *Maryland* was a civil suit brought in the District Court for the Western District of Texas. There jurisdiction was based on diversity. There the controlling law was the state law. *Erie Railroad Company* v. *Tompkins,* 304 U.S. 64 (1938). *Simon* did not involve any question of admiralty or maritime law.

It is appropriate to point out that while petitioner relied on the *Simon* case as authority for its contention in the District Court, petitioner made no reference to *Simon* as an authority in its briefs or argument in the Circuit Court of Appeals, except as a support for its petition for rehearing filed in the Court of Appeals after the PER CURIAM affirmance.

Conclusion

This case has not required the formulation of any new principles or doctrines. It has been decided in accordance with long established principles of admiralty and maritime law. Under its facts there has been no error below and there are no issues of broad scope and general interest. There is no conflict between the decision of the Court below and the decisions of other Courts of Appeal. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

WILBUR H. HECHT,
Counsel for Respondents.

MENDES & MOUNT,
BRENDAN J. CONNOLLY,
of Counsel.